No. 22-6640

IN THE SUPREME COURT OF THE UNITED STATES

EUGENE JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the classification of a prior state conviction as a "serious drug offense" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(A)(ii), depends on the federal controlled-substance schedules in effect at the time of the defendant's prior state crime, the time of the federal offense for which he is being sentenced, or the time of his federal sentencing.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 55 F.4th 846. A prior, vacated opinion of the court of appeals (Pet. App. 120a-142a) is reported at 36 F.4th 1294.

JURISDICTION

The judgment of the court of appeals was entered on December 13, 2022. The petition for a writ of certiorari was filed on January 24, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g). Pet. App. 143a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. Id. at 144a-145a. The court of appeals initially vacated petitioner's sentence and remanded for resentencing, id. at 120a-142a, but subsequently superseded that decision and affirmed, id. at 1a-35a.

1. On September 26, 2017, federal and local law-enforcement officers arrived at a Miami food market to execute a search warrant. Presentence Investigation Report (PSR) ¶ 5. Although the search warrant did not relate to him, petitioner fled on foot when a marked police vehicle approached. Ibid. As officers gave chase, petitioner reached into his waistband, removed a loaded .45-caliber firearm, and dropped it to the ground. Ibid. Petitioner then jumped over a chain-link fence, dropping a sandal in the process, and escaped. Ibid. Following an investigation, petitioner was arrested. PSR ¶¶ 6-9.

A federal grand jury in the Southern District of Florida charged petitioner with one count of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g) and

924(e)(1). Indictment 1. Petitioner pleaded guilty pursuant to a plea agreement. Plea Agreement 1.

2. At the time when petitioner unlawfully possessed a firearm, the default term of imprisonment for that offense was zero to ten years. 18 U.S.C. 924(a)(2) (2012).[1] The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense" committed on separate occasions. 18 U.S.C. 924(e)(1).

The ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). To determine whether a prior state offense meets that definition, courts "ask whether the state offense's elements 'necessarily entail one of the types of conduct' identified in § 924(e)(2)(A)(ii)." Shular v. United States, 140 S. Ct. 779, 784 (2020) (citation and emphasis omitted).

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[1] For Section 922(g) offenses committed after June 25, 2022, the default term of imprisonment is zero to 15 years. See Bipartisan Safer Communities Act, Pub. L. No. 117-159, Div. A, Tit. II, § 12004, 136 Stat. 1329 (18 U.S.C. 924(a)(8) (Supp. 2022)).

The Probation Office recommended that petitioner be sentenced under the ACCA. PSR ¶ 19. The Probation Office listed five prior Florida convictions as ACCA predicate offenses: (1) a 1998 conviction for battery of a law enforcement officer; (2) a 1998 conviction for the sale, manufacture, or delivery of cocaine; (3) a 2003 conviction for armed robbery; (4) a 2004 conviction for possession with intent to sell, manufacture, or deliver cocaine; and (5) 2012 convictions for aggravated assault with a deadly weapon and aggravated battery with a deadly weapon, occurring on the same occasion. PSR ¶¶ 25, 26, 38, 39, 48; see Pet. App. 123a.

The government later conceded that the 1998 battery conviction did not qualify as an ACCA predicate offense. Pet. App. 125a. Petitioner, for his part, acknowledged that the 2003 armed-robbery conviction and the 2012 aggravated-battery conviction qualified as ACCA predicate offenses, id. at 123a-124a, but argued that neither of his cocaine-related convictions qualified as the requisite third predicate offense, id. at 3a. He observed that, at the time of his state convictions, the Florida drug schedules included ioflupane within the definition of cocaine. Id. at 124a; see id. at 135a-136a. And he did not dispute that ioflupane was similarly included within the federal definition of cocaine at that time. See Pet. C.A. Br. 13-14; see also Pet. App. 131a. But he contended that, because ioflupane was later delisted from the federal schedules in September 2015, his

earlier state crimes were not ACCA predicates by the time he unlawfully possessed the gun. Pet. App. 124a, 131a-132a.

The district court rejected that contention and imposed the ACCA's statutory-minimum term of 180 months of imprisonment. D. Ct. Doc. 73, at 23, 26 (Oct. 28, 2021).

3. The court of appeals initially vacated petitioner's sentence and remanded for resentencing. Pet. App. 120a-142a. It premised its decision to do so on the view that fair-notice concerns required comparing petitioner's state drug crimes to the federal drug schedules in effect at the time of his federal firearm offense, rather than an earlier time keyed to the state drug crimes themselves. Id. at 127a-129a. It thus took the view that his state convictions might theoretically have involved a substance -- ioflupane -- later removed from the federal controlled-substance schedules, and that the later removal was enough to exempt the state crimes from ACCA qualification. Id. at 132a-137a.

But shortly thereafter, the court of appeals sua sponte vacated the panel decision and directed the parties to file supplemental briefs discussing the significance of this Court's decision in McNeill v. United States, 563 U.S. 816 (2011), for petitioner's sentence. C.A. Order (Sept. 8, 2022). In McNeill, this Court held that the "plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a

defendant's previous drug offense at the time of his conviction for that offense" to determine whether "'a maximum term of imprisonment of ten years or more is prescribed by law'" for a defendant's previous state drug convictions. 563 U.S. at 820 (quoting 18 U.S.C. 924(e)(2)(A)(ii)). The Court explained that the ACCA "is concerned with convictions that have already occurred" and that the "only way to answer this backward-looking question" is "to consult the law that applied at the time of that conviction." Ibid.

4. In light of McNeill, and following supplemental briefing, the panel issued a revised decision affirming the district court's judgment, in which it "read ACCA's definition of a 'serious drug offense' under state law to incorporate the version of the federal controlled-substances schedules in effect when [the defendant] was convicted of his prior state drug offenses." Pet. App. 16a; see id. at 1a-35a. The court observed that consulting a later-issued drug schedule would invite circumstances where "the state drug convictions would be 'erased' or 'disappear' for ACCA purposes" -- "an impermissible result" under McNeill. Id. at 22a (brackets omitted).

The court of appeals further observed that an adjoining ACCA provision defines "serious drug offense" to include a federal "offense under the Controlled Substances Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by

law." Pet. App. 23a (quoting 18 U.S.C. 924(e)(2)(A)(i) (alteration omitted)). The court observed that the adjoining definition "incorporate[s] the version of the Controlled Substances Act (and thus the federal controlled-substances schedules) in effect at the time the defendant's prior federal drug conviction occurred." Ibid. And the court found it unlikely that "Congress would require the counting of prior federal drug convictions as 'serious drug offenses' while at the same time not counting equivalent prior state drug convictions." Id. at 25a (brackets omitted).

The court of appeals acknowledged that other circuits "construe ACCA's definition of a 'serious drug offense' to incorporate the version of the federal controlled-substances schedules in effect at the time the defendant committed the federal firearm offense," but it disagreed with those circuits' reasoning. Pet. App. 26a. The court explained that its McNeill-based approach did not create fair-notice concerns because "the ACCA term 'previous convictions' puts a defendant on notice when he is convicted of a drug offense for conduct involving a controlled substance that at that time appears on the federal drug schedules" that it will henceforth be the case "that his conviction qualifies as a 'serious drug offense' under ACCA." Id. at 27a-28a. And while the court deemed it potentially "'odd'" that under the "plain meaning of ACCA's text," drug "convictions that predate the federal drug schedules" altogether "would not qualify as ACCA predicates,"

it found no "'absurd[ity]'" that might justify departing from that text. Id. at 28a (quoting Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565 (2005)).

Applying its interpretation to petitioner's case, the court of appeals observed that "the federal drug schedules included ioflupane in 1998 and 2004, when [petitioner] was convicted of his prior state drug offenses." Pet. App. 30a. And because the Florida drug statutes in effect at the time of petitioner's earlier crimes "did not reach more conduct with respect to cocaine" than the federal drug schedules did at those times, ibid., the court found that petitioner's prior convictions categorically "qualify as 'serious drug offenses' under 18 U.S.C. § 924(e)(1)," id. at 31a (brackets omitted).

Judge Rosenbaum, who authored the majority opinion, also issued a concurring opinion. Pet. App. 32a-35a. In her view, it would be easier for an "ordinary citizen" to consult "the version of the controlled-substances list in effect when [he] commits his federal firearm offense," and she "urge[d] Congress to consider amending the statute to incorporate" that alternative approach. Id. at 33a, 35a.

DISCUSSION

Petitioner contends (Pet. 35-40) that the classification of his prior state convictions as "serious drug offenses" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), should not turn on the federal

controlled-substance schedules in relation to the state drug crimes themselves, but instead on the schedules at the time when he committed or (alternatively) was sentenced for his federal firearm offense. The court of appeals correctly rejected that contention. But as petitioner notes (Pet. 15-32), the question presented recurs frequently and is the subject of a conflict in the courts of appeals. This case is a suitable vehicle to resolve that conflict. This Court should therefore grant the petition for a writ of certiorari.

1. The controlled-substance schedules relevant to classifying a defendant's prior state drug convictions as "serious drug offense[s]" under the ACCA, 18 U.S.C. 924(e)(2)(A), should depend on the timing of the state crimes, not the time of the later federal firearm crime or sentencing for that crime. That approach flows from the statutory text and structure, as well as this Court's precedents.

The ACCA provides for an enhanced sentence if a defendant "has three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another." 18 U.S.C. 924(e)(1). As relevant here, the ACCA defines a "serious drug offense" to include "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21

U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii).

As this Court explained in McNeill v. United States, 563 U.S. 816 (2011), the ACCA's "plain text" "is concerned with convictions that have already occurred." Id. at 820. Specifically, the ACCA "requires the court to determine whether a 'previous convictio[n]' was for a serious drug offense," and "[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction." Ibid. (first set of brackets in original).

The statute's structure points the same way. The adjoining subsection defines a serious drug offense to include "an offense under the Controlled Substances Act [or certain other federal statutes] for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i). As the court of appeals explained, and petitioner does not dispute, see Pet. 40, that provision requires a court to consult the drug schedules in effect at the time of the prior offense. Pet. App. 23a. It would be anomalous to require different treatment of analogous state-law offenses, thereby differentiating defendants with equivalent prior-offense conduct based solely on whether they were convicted in state court or federal court. And it would be even more anomalous for prior offenses that originally qualified as ACCA predicates to "'disappear' entirely for ACCA purposes"

(and, possibly, later reappear) due to later events. McNeill, 563 U.S. at 822 (citation omitted).

Petitioner asserts that "fair-notice principles" support consulting the federal drug schedules in effect at the time of the federal offense or, alternatively, the time of federal sentencing. Pet. 36; see Pet. 35, 38. But the court of appeals' approach "permits a defendant to know even before he violates § 922(g) whether ACCA would apply," McNeill, 563 U.S. at 823; the classification of a state conviction is fixed by the time of that conviction and does not change thereafter. Petitioner also argues that it would be "illogical to conclude that federal sentencing law attaches 'culpability and dangerousness'" to a criminal act involving a substance that was subsequently delisted. Pet. 39 (citation omitted). But a "defendant's history of criminal activity -- and the culpability and dangerousness that such history demonstrates -- does not cease to exist" in that circumstance. McNeill, 563 U.S. at 823.

2. Although the court of appeals correctly affirmed petitioner's sentence, its decision implicates a circuit conflict that warrants resolution by this Court.

In contrast to the decision below, one circuit has held that courts should consult the federal drug schedules in effect at the time of the federal offense in determining whether a prior state conviction was for a serious drug offense under the ACCA. See

United States v. Brown, 47 F.4th 147, 151-153 (3rd Cir. 2022), petition for cert. pending, No. 22-6389 (filed Dec. 21, 2022). Another circuit has adopted a time-of-federal-sentencing rule. See United States v. Hope, 28 F.4th 487, 504 (4th Cir. 2022). And two other circuits have rejected the government's position without deciding between a time-of-federal-offense and time-of-sentencing rule. See United States v. Williams, 48 F.4th 1125, 1138 & n.8 (10th Cir. 2022); United States v. Perez, 46 F.4th 691, 699 (8th Cir. 2022).

In this case, because ioflupane was removed from the federal drug schedules prior to both petitioner's federal offense and sentencing, petitioner would prevail in any of those four circuits. See Pet. 32. And as petitioner notes (Pet. 26-32), the question presented is important and recurring; the emergence of a five-circuit conflict in roughly the past year illustrates the frequency with which this issue arises.

3. This case presents a suitable vehicle for resolving the question presented. The court of appeals squarely decided the question, addressing relevant arguments, and did not offer any alternative grounds for the outcome that it reached. This case also arises on direct appeal, without any procedural complications like the plain-error standard.

This case additionally offers the Court the opportunity to select from the three alternative approaches that the courts of

appeals have adopted. Petitioner principally advocates a time-of-federal-offense approach, but advances the time-of-federal-sentencing approach as an alternative. Under the government's approach, the classification of a prior state offense would instead turn on the drug schedules that temporally correspond to the state crime for which the defendant was convicted. This case accordingly provides an appropriate vehicle for this Court to fully eliminate the circuit conflict by determining which of the three approaches is correct.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[2] This case is thus a better vehicle for resolving the question presented than the pending petition for a writ of certiorari in Brown, supra (No. 22-6389), in which neither party advocates a time-of-federal-offense (as opposed to a time-of-federal-sentencing or time-of-state-crime) approach. See U.S. Br. 9-10, Brown, supra (No. 22-6389). As explained in the government's concurrently filed brief in Brown, that petition should be held pending the Court's resolution of this case.